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No. 89-1647

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1989

CARNIVAL CRUISE LINES, INC.,

Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Ninth Circuit Court of Appeals correct in finding that the Petitioner's contacts within the State of Washington and Petitioner's efforts directed at the residents of the State of Washington were sufficient for the constitutional exercise of the Washington long-arm statute?
2. Is the forum selection clause printed on a steamship passenger ticket enforceable in the factual context of this case?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated February 22, 1990, is to be reported at 897 F.2d 377 and is reproduced at pages 1a-24a of the Petitioner's Appendix. The original opinion of the Court of Appeals, dated December 12, 1988, is reported at 863 F.2d 1437 and reproduced at Pet. App. 25a-48a. The order of the Court of Appeals withdrawing the original opinion and certifying a question to the Supreme Court of Washington is reported at 872 F.2d 930

and reproduced at Pet. App. 49a. The opinion of the Washington Supreme Court on the certified question is reported at 113 Wash. 2d 763 and 783 P.2d 78 and reproduced at Pet. App. 50a-59a. The order and judgment of the United States District Court for the Western District of Washington, dated June 25, 1987, are not reported and are reproduced at Pet. App. 60a-65a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves: the due process clauses of the Fifth and Fourteenth Amendments; two provisions of the Limited Liability Act: 46 U.S.C. § 183(b) & 183c and 28 U.S.C. § 1404(a) & 1406(a); Rule 4 of the Federal Rules of Civil Procedure; and the Washington long-arm statute Wash. Rev. Code Ann. § 4.28.185. These materials are reprinted at Pet. App. 66a-71a.

COUNTERSTATEMENT OF THE CASE

This is an action which arises out of a personal injury on board a cruise ship, the M/V TROPICALE, in April of 1986. Plaintiffs were passengers on board that vessel. This action is brought, in Admiralty, pursuant to 28 U.S.C.

§ 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. Mrs. Shute was injured while the vessel was in international waters. See Pet. App. 2a.

The plaintiffs are residents of the State of Washington and purchased their tickets in the State of Washington from a local travel agency. The affidavit of Lynn Weber substantiates that the tickets were purchased through her, and that Mrs. Shute paid for the tickets by giving a check to the travel agent, and received the tickets from the travel agent. The entire transaction took place in the State of Washington. Ms. Weber's affidavit is attached to this brief as Respondent's Appendix 1. The case was initially dismissed by the Honorable Carolyn Dimmick for want of jurisdiction. See Pet. App. 60a-65a. This decision was reversed by the Ninth Circuit Court of Appeals in their decision which has been published at 863 F.2d 1437, which is reproduced in Petitioner's Appendix pages 25a-48a. This decision was withdrawn in order to allow the Washington State Supreme Court to answer a question regarding the scope of the Washington State long-arm statute, Wash. Rev. Code Ann. § 4.28.185. The Supreme Court's opinion is reproduced in the Petitioner's Appendix. In that decision, the Washington State Supreme Court adopted the "but-for" requirement articulated by the Ninth Circuit Court of Appeals in their earlier decision. They specifically found that the activities of Carnival Cruise Lines, Inc., within the State of Washington, and directed at the residents of the State of Washington, were sufficient for the constitutional exercise of the Washington State long-arm statute. Based upon this decision, which is recorded at 113 Wash. 2d 763 and reproduced in the Petitioner's Appendix, the Court of

Appeals reissued its earlier decision. That decision is recorded at 897 F.2d 377 and is reproduced in Petitioner's Appendix.

**REASONS FOR DENYING THE WRIT
OF CERTIORARI**

**I. THERE IS NO TRUE CONFLICT BETWEEN THE
CIRCUITS AS TO WHEN A CAUSE OF ACTION
ARISES OUT OF THE ACTIVITIES IN THE
FORUM STATES.**

Petitioner is correct that the issue in this case, at least as to jurisdiction, is a determination of what kind of relationship is necessary between a plaintiff's cause of action and a defendant's contacts with the forum state in order to establish a basis for specific *in personam* jurisdiction consistent with the due process clause of the Fourteenth Amendment. However, Petitioner incorrectly asserts that there is a true division of authorities between the various circuit courts. In reality, the divisions between the circuit courts are semantic divisions. The tests involved in all circuits are, in reality, tests to determine whether or not the assertion of jurisdiction is reasonable under the circumstances.

In fact, the court has effectively disposed of this issue in its earlier rulings in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and *Calder v. Jones*, 465 U.S. 783 (1984). These cases recognize that specific jurisdiction is appropriate when the defendant has purposely directed its activities at the residents of a state, or purposely availed itself of the benefits of doing business in the state

in order to secure an economic benefit. The Court has recognized that in the modern age, it is not necessary for a corporation to maintain or own property within a state in order for it to conduct business within that state. See *Burger King Corporation v. Rudzewicz*, supra, at 476. The Court in *Burger King Corporation v. Rudzewicz*, supra, recognizes that a substantial amount of business is conducted across the lines by mail, telephone, and wire transactions. In this case, it is undisputed that the contacts that Carnival maintains with the State of Washington are not random or fortuitous, but are systematic. Advertising campaigns are, by nature, a systematic and continuous enterprise. The actions of the appellant in holding sales seminars within the state, paying for the commissions of travel agents, and selling tickets to in-state residents establish a commercial presence within the jurisdiction. Petitioner admits that it receives a commercial benefit from these efforts in the form of sales to Washington residents. The Washington State Supreme Court held that there were ample contacts for the exercise of jurisdiction under the Washington long-arm statute. Modern commercial practices and the advanced state of telecommunications make it very easy for a corporation to transact business within a state without establishing a physical presence therein. If Petitioner is willing to transact business in Washington for its own benefit, it is not unreasonable, nor does it offend traditional notions of fair play to expect Petitioner to defend a suit in this state which arises from its activities.

The only division of authority which exists is in the interpretation of the term "arises from" in regard to specific jurisdiction. In the First and Eighth Circuits, in the

cases of *Marino v. Hyatt Corporation*, 793 F.2d 427 (1st Cir. 1986) and *Pearrow v. National Life and Accident Insurance Co.*, 703 F.2d 1067 (8th Cir. 1983), respectively, an extremely restrictive view has been taken. These cases seem to take the position that the defendant's presence, or efforts directed at the residents of the state must be of the same nature or type as that causing the injury. The Ninth Circuit, in *Shute v. Carnival Lines*, supra, takes the more reasonable position. They reasoned that, but for the activities of the defendant in the state, no business relationship would have occurred and the plaintiff would not have been injured.

The Washington long-arm statute, Wash. Rev. Code Ann. § 4.84.185, provides as a basis for the assertion of jurisdiction "transacting of business" within the state. If the argument of Petitioner in this action were adopted, this would be limited to business torts, or torts which actually occur within the borders of the state. This is obviously not the intent of the Washington State legislature, and in fact, cases involving personal injury make up the majority of cases involving the "transacting of business" as grounds for long-arm jurisdiction. See *Callahan v. Keystone Fireworks Manufacturing Company*, 72 Wash. 2d 823, 735 P.2d 626 (1967) and *Deutsch v. West Coast Machinery Corporation*, 80 Wash. 2d 707, 497 P.2d 1311 (1972). In the *Callahan* case, for example, the actual injury occurred in Idaho.

In reality, the circuit courts have come to different conclusions based upon different interpretations of what is reasonable, and what is too tenuous a result or connection between the defendant and the forum state. These disputes can be resolved factually, on a case by case basis,

and do not require the intervention of this Court. This is not an appropriate case for the grant of certiorari.

II. THE FORUM SELECTION CLAUSE IN THIS CASE IS IN VIOLATION OF A FEDERAL STATUTE, AND THERE IS NO TRUE DIVISION IN THE COURTS AS TO ITS ENFORCEABILITY.

46 U.S.C. § 183(c) makes it unlawful for a shipping line to include in a ticket contract:

"provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss, or injury, or the measure of damages therefor."

Provisions which violate the statute are deemed to be void. The Petitioner's rather disingenuous argument that because the forum selection clause is not listed specifically in the statute, it is therefore expressly permitted, ignores the remedial nature of the statute, and its expansive wording. The Court of Appeals in this case did not reach the issue as to whether or not the statute rendered this provision void. At footnote 9 of their decision they state:

"Because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of this statute on forum selection agreements. We do note, however, that the statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairness of this type of contract."

A much more appropriate analogy can be drawn to a similar provision in the Carriage of Goods by Sea Act, (COGSA), 46 U.S.C. § 1303(a). Courts interpreting forum selection clauses in bills of lading have found them to be void. See *Indussa Corp. v. S. S. Ranborg*, 377 F.2d 200 (2d Cir. 1968) and *Mitsui & Co. Limited v. M/V GLORY RIVER*, 464 F. Supp. 1004 (W.D. Wash. 1978). This recognizes Congress's intent to prevent the shipowner from exercising unfair bargaining power.

Cases cited by Petitioner, in particular *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), ("The Bremen"), deal with commercial towing contracts. The basis of The Bremen decision was that the parties to those contracts have approximately equal bargaining power. The Court in *The Bremen*, supra, states that such contracts should not be set aside unless one party can clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud, or overreaching or overweening bargaining power. *The Bremen*, supra, at 407 U.S. 12. In this case, it is difficult to imagine a clearer instance of one party having all the bargaining power and the other party having none. The passenger purchasing a ticket in this case has no opportunity to negotiate the conditions of his or her ticket. The result of a forum selection clause such as this, is to require the plaintiffs to bring an action thousands of miles away from where the accident occurred, or the plaintiff's residence; and in a forum which has no logical connection to the action itself.

Petitioner cites several cases to support its argument that there is a division in the circuits, but a closer examination of the facts of those cases show that they are

clearly distinguishable from the case at bar. In *Hodes v. S. N. C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3rd Cir. 1988), the Court upheld the clause, because it did not find that the forum selection clause was unreasonable. 46 U.S.C. § 183 did not apply because the voyage did not touch the United States. The Court noted, at 913 of the opinion, that the selection of Italy as a forum was not unreasonable because the voyage began and ended in Italy, the vessel was owned by an Italian company, operated by an Italian crew, and only about ten percent of the passengers were from the United States. Under those circumstances, the selection of an Italian forum was not unreasonable, and passengers should expect to have to go to Italy to sue. The same is true in *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D.Ill. 1987), a case in which an Illinois passenger sued, in diversity, in his own State of Illinois. The District Court transferred the action to Florida, based on an identical forum selection clause. In that case the Court found, at 472, that the advertising solicitation of travel agents, distribution of brochures, and sales of tickets were sufficient for the exercise of long-arm jurisdiction, but found that a change of venue was appropriate. The Court noted, at 479 of the opinion, that the tort occurred in territorial waters off Florida, that the voyage began and ended in Florida, and that most of the witnesses were in Florida. In cases such as this, and in *Hollander v. K-Lines Hellenic Cruises*, 670 F. Supp. 563 (S.D.N.Y. 1987), the courts have found that when there is a logical and reasonable basis for the forum selection clause, it will be enforced, even when it is not actually negotiated by the parties. This is not the case here.

In this case, there is no connection between this action and the State of Florida other than the location of the Petitioner's corporate headquarters. The voyage began and ended in California, the ticket was purchased in Washington, the plaintiffs are residents of Washington, and the treating physician of Mrs. Shute, as well as several of the eye-witnesses, reside in Washington. The forum selection clause in this case serves no logical basis and its only purpose is to hinder the respondents in their action.

Based upon the facts in this case, certiorari should not be granted. The cases cited by Petitioner are clearly distinguishable, as most of them involve foreign cruises. This is a cruise beginning and ending in the United States. Respondents would also contend that this is a case in which the appropriate statute, 46 U.S.C. § 183c, renders the forum selection clause invalid.

CONCLUSION

The petition for certiorari should be denied.

Respectively submitted,

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Counsel of Record

RESPONDENTS' APPENDIX

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON

EULALA SHUTE and RUSSEL)	
SHUTE, husband and wife,)	IN ADMIRALTY
)	NO. C86-1204D
Plaintiffs,)	AFFIDAVIT OF
)	LYNN WEBER
v.)	
CARNIVAL CRUISE LINES,)	
a foreign corporation,)	
)	
Defendant.)	
<hr/>		
STATE OF WASHINGTON)	
) ss.	
COUNTY OF KING)	

LYNN WEBER, duly sworn on oath, deposes and states:

1. I make this Affidavit from my own personal knowledge.
2. I have worked as a travel agent in the State of Washington for seven years.
3. I am presently employed as a travel agent at Smokey Point Travel, 3210 Smokey Point Drive, Arlington, Washington. I have worked there three years.
4. In my work as a travel agent, I have become familiar with Carnival Cruise Lines and have sold a number of tickets for Carnival Cruise Lines cruises.
5. Carnival Cruise Lines is a well-known cruise ship line both in Washington and on a national level.

Res. App. 2

6. Carnival Cruise Lines advertises regularly in Washington papers and I have seen and am familiar with their advertisements.

7. Carnival Cruise Lines periodically holds seminars for travel agents in the State of Washington to inform them about Carnival Cruise Lines cruises and to encourage said Washington travel agents to sell Carnival Cruise Lines cruises. I have attended these seminars.

8. Carnival Cruise Lines mails brochures to travel agents, including Smokey Point Travel. These brochures describe and explain their cruises. The travel agent, in turn, distributes this information to consumers.

9. When a consumer decides on a cruise, they pay money directly to Smokey Point Travel which, in turn, then contacts Carnival Cruise Lines, makes the reservations, and forwards payment to Carnival Cruise Lines.

10. Carnival Cruise Lines, after receipt of payment, sends the passage tickets and further information brochures to the travel agency which then contacts the consumers and forwards the ticket and information brochure to them.

11. For each cruise arranged, the travel agent receives a commission from Carnival Cruise Lines.

12. I sold to Eulala and Russel Shute Carnival Cruise Lines tickets for a March, 1986 cruise on the MV/Tropical.

/s/ Lynn Weber
LYNN WEBER

Res. App. 3

SUBSCRIBED AND SWORN to before me this 18th day of May, 1987.

/s/ Illegible
NOTARY PUBLIC in and
for the State of Washington,
residing at Mukilteo, Washington
My comm. expires 8/30/88
